

Hold the Phone: Making the Call for “Personal Exceptions” to the Do-Not-Call Registry

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The national do-not-call registry has empowered a country of consumers to demand solitude during mealtime, but only so much as noncommercial telemarketers will allow. This is because the current system of prohibiting unwanted calls only applies to commercial interruptions and exempts such noncommercial entities as political groups and charities. While the current do-not-call list has been found constitutional at the appellate level despite this unsettling distinction, the privacy values upon which the list was established cannot be realized as long as Congress suggests that an unwanted commercial call is less intrusive than an unwanted noncommercial call. Congress should therefore embrace its do-not-call privacy goals by giving individuals the option of excluding any number of unwanted telemarketers, regardless of the content of the message.

I. INTRODUCTION

President George W. Bush announced the commencement of the national do-not-call registry on June 27, 2003, and in its first six months over fifty-five million telephone numbers were added to the list.¹ It was a response due in part to the efforts of both the Federal Trade Commission (FTC) and the Federal Communications Commission (FCC) in that the agencies promoted the registry in a way not unlike how telemarketers might hawk a cure-all solution to annoying weekend and dinnertime interruptions.²

Americans do not think favorably of telemarketers,³ and despite the fact that the telemarketing industry generated \$275 billion and employed over five million

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¹ *Regulators Issue First Citation for Violation of No-Call Law*, N.Y. TIMES, Dec. 19, 2003, at C9; FTC, *National Do Not Call Registry Opens*, available at <http://www.ftc.gov/opa/2003/06/donotcall.htm> (last visited Sept. 5, 2003).

² The FCC website introduces the do-not-call registry by cordially asking, “Has your evening or weekend been disrupted by a call from a telemarketer? If so, you’re not alone.” FCC, *National Do-Not-Call Registry*, available at <http://www.fcc.gov/cgb/donotcall/> (last visited Sept. 5, 2004).

³ See Hilary B. Miller & Robert R. Biggerstaff, *Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes*, 52 FED. COMM. L.J. 667, 686 (2000) (citing studies that determined .1% of the U.S. population enjoys receiving unsolicited calls and 69% of people find these calls offensive); see also Tom Incantalupo, *More Sold on Idea of Selling Cars; New Talent Has Increased Competition*, SEATTLE TIMES, Dec. 28, 2003, at J1. According to an annual Gallup survey, even car salespeople rate higher than telemarketers in terms of perceived honesty and integrity. See *id.*

people in the year before the registry was created,⁴ the response to the war on unidentified hang-ups, filled answering machine tape, and tied-up business lines has been overwhelming.⁵ The United States has rapidly embraced a shop-at-home culture, but the convenience of e-commerce shrinks considerably when it allows telemarketers to make unsolicited contacts.⁶ Many people, faced with the unappealing options of screening messages or turning off the ringer and answering machine, support all measures designed to combat unwanted calls.⁷

Telemarketing is simply marketing over the telephone—the calling of individuals in order to solicit donations or sales.⁸ Organizations that engage in telemarketing either hire their own employees for that purpose or retain independent telemarketing companies.⁹ The industry is regulated and governed by the FTC, the FCC, Congress, the Department of Justice, and state attorneys general. Additionally, telemarketers maintain a code of ethics,¹⁰ but despite these

⁴ See *Mainstream Mktg. Serv., Inc. v. FTC*, 283 F. Supp.2d 1151, 1154 (D. Colo. 2003). Some industry analysts claim that telemarketing revenues are much higher. For example, the American Teleservices Association (ATA), a trade organization “dedicated exclusively to the teleservices industry,” reported in 2003 that call centers “generate annual sales of more than \$500 billion.” ATA, *About the ATA*, available at <http://www.ataconnect.org/about.htm> (last visited Sept. 5, 2004).

⁵ See Joel Cohen & Jonathan A. Fier, *Automated Telemarketing: Are the Restrictions Sufficient?*, N.Y.L.J., July 11, 1995, at 1. When nationally syndicated columnist Dave Barry published the telephone number of the ATA in his column, the organization was forced to disconnect the number after receiving more than one thousand calls. Barry called it “the most intense response [he had] ever gotten” and quipped that he hoped “nobody interrupted the ATA’s dinner.” Barnaby J. Feder, *For Direct Marketers, The No-Call Dispute Falls Close to Home*, N.Y. TIMES, Oct. 13, 2003, at C3.

⁶ See Allan Robert Adler, *Reach Out and Touch Someone, With Care*, LEGAL TIMES, May 17, 1993, at 27.

⁷ See Cohen & Fier, *supra* note 5, at 1; Adam Liptak, *No-Call List: Hard Choices*, N.Y. TIMES, Sept. 27, 2003, at A1.

⁸ This is how the district court characterized telemarketing in *Mainstream Marketing Services, Inc.*, 283 F. Supp. 2d at 1154. However, telemarketing has also been defined specifically in various statutes. See, e.g., Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, sec. 3, § 227(a)(3), 105 Stat. 2394, 2395 (1991) (defining telephone solicitation as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services . . .”). Telemarketing in the broad sense can be thought of as all manner of calls by entities designed to solicit or inform. Typically one pictures large call centers where the work is “individualized, repetitive, scripted, and machinepaced by expert systems . . .” Rosemary Batt, *Work Organization, Technology, and Performance in Customer Service and Sales*, 52 INDUS. & LAB. REL. REV. 539, 540 (1999).

⁹ *Mainstream Mktg. Serv., Inc.*, 283 F. Supp. 2d at 1154–55.

¹⁰ ATA, *Code of Ethics*, at <http://www.ataconnect.org/ethics.htm> (last visited Sept. 5, 2003). The telemarketing code of ethics published by the ATA coincides significantly with the dictates of state and federal law. The code emphasizes the importance of proper training, etiquette, and courtesy, and rebukes as unprofessional and dishonest all “[c]laims which are

protections, America has struggled with what is appropriate telemarketing since Congress first significantly regulated the industry in 1991.¹¹

The current do-not-call registry effectively limits commercial callers, but its failure to address noncommercial callers is inconsistent with its privacy goals. This Note argues that the rules that govern the national list do not effectively satisfy the protection of privacy, an asserted purpose of the list.¹² Part II of this Note reveals this purpose through a chronological survey of the federal response to the public's demand for telemarketing restrictions. Following this examination of federal law, Part III discusses the telemarketing industry's response to regulation both in terms of public relations and legal arguments. This section explains the industry's compelling but unsuccessful argument that the national list unconstitutionally discriminates against commercial speech.¹³ Finally, Part IV proposes an alteration to the do-not-call registry that both strengthens privacy where Congress and its agents have not and addresses the constitutional concerns of the telemarketing industry regarding content discrimination. If the federal justification for the national registry is truly to ensure that Americans are neither annoyed nor their privacy invaded by unwanted solicitations, then the best way to maximize this goal of privacy and autonomy is to allow individuals, and not the government, to select which telemarketers may call.¹⁴

II. THE FEDERAL RESPONSE

The federal response to increased telemarketing has been to regulate commercial callers in order to protect privacy. Noncommercial callers, however, such as charities and political groups, have been consistently exempted.¹⁵ These

untrue, misleading, deceptive, fraudulent or unjustly disparaging of competitors." *Id.*

¹¹ See Telephone Consumer Protection Act of 1991 § 1.

¹² See *id.* § 2(12), 105 Stat. at 2394-95 ("Banning such automated or prerecorded telephone calls . . . is the only effective means of protecting telephone consumers from this nuisance and privacy invasion."); Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, § 3(a)(3)(A), 108 Stat. 1545, 1545 (1994) ("[T]elemarketers may not undertake a pattern of unsolicited telephone calls which [is] . . . coercive or abusive of [a] consumer's right to privacy."); Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4631 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310.4(b)(1)(iii)) ("[The list] provides a mechanism that a consumer may use to indicate . . . an invasion of privacy."); Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 68 Fed. Reg. 44,144, 44,144 (July 25, 2003) (to be codified at 47 C.F.R. pts. 64 & 48) ("The TCPA requires the [FCC] to protect residential telephone subscribers' privacy rights . . .").

¹³ See *Mainstream Mktg. Serv., Inc.*, 283 F. Supp. 2d at 1163; *Mainstream Mktg. Serv., Inc. v. FTC*, 358 F.3d 1228, 1246 (10th Cir. 2004).

¹⁴ See *infra* Part IV.

¹⁵ See, e.g., Bobbi Buchanan, Editorial, *Don't Hang Up, That's My Mom Calling*, N.Y. TIMES, Dec. 8, 2003, at A29.

exemptions occur despite assertions by Congress that the regulation of all telemarketing is essential to protecting individual privacy.¹⁶ The relevant legislation and rules therefore read like a contradiction in terms; they welcome with one hand the right of privacy and the desire to be free of unwanted calls, and dismiss with the other hand any attempt to include noncommercial telemarketers in the group of prohibited callers. This discretionary approach, whereby noncommercial callers are exempted, directly conflicts with the notion that an unwanted call is an unwanted call whether it is made by a salesperson, an evangelist, or a pollster.¹⁷ Either way, the ring of the telephone sounds the same.¹⁸

Before Congress ever formally regulated telemarketing, forty states had already placed prohibitions of some form on automatic dialing machines and unsolicited calls.¹⁹ There was still a need for regulation of interstate callers, however, and Congress began to legislate.²⁰ The FTC announced its decision to create a national do-not-call registry on December 18, 2002, but this was only one

¹⁶ See, e.g., Telemarketing Consumer Protection Act of 1991 § 2(10) (“[A]utomated or prerecorded telephone calls, regardless of the content or the initiator of the message, [are] a nuisance and an invasion of privacy.”); see also *infra* Parts II.A–F. This Note discusses telemarketing as an infringement of privacy in the home, but the privacy issue also extends to how personal information is shared between businesses and the telemarketers they employ. See Peter P. Swire, *Modern Studies in Privacy Law: Notice, Autonomy and Enforcement of Data Privacy Legislation: The Surprising Virtues of the New Financial Privacy Law*, 86 MINN. L. REV. 1263, 1307–08 (2002) (citing President Bill Clinton, Remarks by the President at the Eastern Michigan University Commencement (Apr. 30, 2000), available at http://www.privacy2000.org/presidential/POTUS_4-30-00_EMU_graduation_speech.htm).

¹⁷ One potential justification for distinguishing between commercial and noncommercial telemarketers is that commercial callers solicit more often. However, this argument overlooks the fact that charitable organizations and political campaigns can also be profuse callers. See Adler, *supra* note 6.

¹⁸ See Liptak, *supra* note 7.

¹⁹ S. REP. NO. 102-178, at 3 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1970. The FCC first investigated whether unsolicited calls should be regulated in 1980 but declined at that time to promulgate any rules. The issue was studied again in 1986 and again no rules were announced. *Id.* (citing *Unsolicited Telephone Calls*, 77 F.C.C.2d 1023 (1980) and *Automatic Dialing Devices*, FCC Release No. 86-352 (1986)).

²⁰ S. REP. NO. 102-178, at 3. The degree of variation by which states regulate telemarketers is severe and touches on a number of issues, including disclosure requirements, registration fees, bonds, sanctions, and state-determined exemptions for as many as twenty-eight types of solicitors. See Patricia Pattison & Anthony F. McGann, *State Telemarketing Legislation: A Whole Lotta Law Goin’ On!*, 3 WYO. L. REV. 167, 176–92 (2003) (explaining in detail the variety of state legislation and arguing that federal regulation may best protect individual privacy because “state legislation has resulted in a patchwork of ineffective remedies”). *Id.* at 197.

more development in a public debate that had started over ten years earlier.²¹

The federal response to telemarketing is difficult to follow because it involves two different federal laws that empowered two different federal agencies to create two different rules.²² The confusion has resulted in a national do-not-call registry that is managed by the FTC but enforced by both the FTC and the FCC, depending on the industry of the offending organization and which of the two agencies has jurisdiction.²³ Both Commissions implement one list significantly motivated by the protection of privacy rights but deficient in this regard because of an inability to stop all unwanted calls, such as those from nonprofit groups. The following progression of statutes and rules explains how this result occurred.

A. *The Telephone Consumer Protection Act of 1991*

Congress first officially contemplated using a national do-not-call registry to protect individual privacy in the Telephone Consumer Protection Act of 1991

²¹ See Susan McDonald, *National "Do Not Call" List Raises Privacy Concerns for Telemarketers*, METROPOLITAN CORP. COUNS. (Northeast Edition), Apr. 2003. Consumers have had several complaints regarding telemarketers: prerecorded messages often do not disconnect after the recipient hangs up, the caller is often unidentified, inappropriate messages can be delivered accidentally to children, emergency lines are unavailable when called by a computer that randomly or sequentially dials, and it is the consumer that bears the cost of calls made to cellular telephones and pagers. See Cohen & Fier, *supra* note 5; Rita Marie Cain, *Call Up Someone and Just Say 'Buy'—Telemarketing and the Regulatory Environment*, 31 AM. BUS. L.J. 641, 641 (1994). To be fair, the consumer actually bears the cost of calls made to landlines as well because the consumer pays a common carrier for the service. See *id.* Also, random and sequential dialing were becoming a thing of the past even in 1991. Computer software allows companies to organize customers according to how likely they are to make a purchase and what they are inclined to buy. As a result, most telemarketing calls are "targeted" rather than random. H.R. REP. NO.102-317, at 7 (1991). If regulation is really about curbing the financial woes of consumers, however, some have argued that the best solution is to allow consumers to set a price for the time they spend listening to telemarketers. See Ian Ayres & Matthew Funk, *Marketing Privacy*, 20 YALE J. ON REG. 77, 80-81 (2003) (arguing that a "name your own price" system would essentially give consumers a market control by which the price they set for minutes occupied by telemarketers would operate to determine the amount of calls received).

²² *Telemarketers, Public on Hold Over Status of Do-Not-Call List*, 7 TELECOMM. INDUSTRY LITIG. REP. NO. 9, Oct. 7, 2003, at 3. It is difficult to explain why this disjointed, dual-agency approach was taken, but a chorological investigation explains how it happened. See *infra* Parts II.A-F. It is a common theme of administrative law that agencies compete for influence with both the executive and the legislative branch, and this element of the do-not-call story is compounded by the fact that the FTC and FCC have overlapping jurisdictions. See, e.g., Jonathan R. Macey, *Regulatory Globalization as a Response to Regulatory Competition*, 52 EMORY L.J. 1353, 1354 (2003); McDonald, *supra* note 21.

²³ See Matt Richtel, *After Delays, U.S. Prepares To Enforce Do-Not-Call List*, N.Y. TIMES, Oct. 11, 2003, at C2.

(TCPA).²⁴ Passed in response to a growing market and a perceived need for regulation, the TCPA serves two functions:²⁵ it restricts the use of automatic telephone dialing systems, prerecorded or artificial voices, and telephone facsimile machines;²⁶ and it authorizes the FCC to determine whether a national do-not-call list should be established by the Commission in order “to protect residential telephone subscribers’ privacy rights”²⁷

The restriction on telemarketing devices applies to all callers no matter whether they are telemarketers, charities, or next-door neighbors.²⁸ The authorization given to the FCC, however, only allows for rules that pertain to “telephone solicitations,” which are defined by the Act as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services”²⁹ Expressly excluded from this definition are individuals who give permission to be called, individuals with

²⁴ Telephone Consumer Protection Act of 1991, sec. 3, § 227(c)(1)(A), 105 Stat. at 2397.

²⁵ *Id.* sec. 2, 105 Stat. at 2394. During the year before the Act was passed, 30,000 businesses called more than eighteen million Americans every day and generated annual sales totaling \$435 billion. This represented a 400% increase in six years. *Id.* sec. 2(2)–(4); Cain, *supra* note 21. The TCPA is an amendment to the Communications Act of 1934, which formed the FCC for two purposes: to “regulat[e] interstate and foreign commerce in communication by wire and radio . . .” and to create a “rapid, efficient, Nation-wide, and world-wide wire and radio communication service. . . .” 47 U.S.C. § 151 (2000).

²⁶ Telephone Consumer Protection Act of 1991, sec. 3, § 227(b), 105 Stat. at 2395–96. These devices are popular in the industry because they increase the number of individuals that telemarketers can reach, and the machines are never tired, discourteous, or in need of a raise. See Cohen and Fier, *supra* note 5. Unsolicited facsimile advertising or “junk faxing” was a major target of the TCPA. See H.R. REP. NO. 102-317, at 10. Junk faxing provides an interesting comparison. Just as with telemarketing, the TCPA draws a potentially irrational distinction between commercial and noncommercial faxes, despite both being unsolicited. See *Company Seeks to Test Junk-Fax Law in Supreme Court*, 7 TELECOMM. INDUSTRY LITIG. REP. NO. 14, Dec. 2, 2003, at 4. This issue was the focus of a lawsuit brought by the Attorney General of Missouri against Fax.com, a website that advertises the largest database of fax numbers in the world. See *id.* The result was an Eighth Circuit decision in *Missouri ex rel Nixon v. American Blast Fax, Inc.*, 323 F.3d 649, 659–60 (8th Cir. 2003) that the system of only banning unsolicited commercial faxes sufficiently serves the government interest of preventing unwanted fax costs when analyzed according to an intermediate scrutiny standard. *Am. Blast Fax, Inc.*, 323 F.3d at 659–60. Fax.com continues to be the target of lawsuits, due in part to the fact that the TCPA authorizes a private cause of action for recipients of junk faxes. See Lisa Napoli, *Crusaders Against Junk Faxes Brandish Lawsuits*, N.Y. TIMES, Dec. 16, 2003, at C1. Most surprising is that the company managed to send a junk fax to the FCC, to which the Commission responded with a warning letter. See *id.*

²⁷ Telephone Consumer Protection Act of 1991, sec. 3, § 227(c)(1), 105 Stat. at 2397. The FCC was authorized to evaluate a variety of methods and procedures and consider costs, effectiveness, and other advantages and disadvantages. See *id.*

²⁸ See *id.* sec. 3, § 227(b)(1), 105 Stat. at 2395.

²⁹ *Id.* sec. 3, § 227(a)(3), 105 Stat. at 2395.

whom there exists an “established business relationship,” and tax-exempt nonprofit organizations such as charities.³⁰

In response to Congress’s grant of authority and discretion, the FCC decided against a national registry and instead chose to require telemarketers to maintain company-specific do-not-call lists that allow consumers to inform soliciting businesses that they do not wish to be contacted by that particular company.³¹ This system can be thought of as numerous independent do-not-call lists maintained by the telemarketers themselves, as opposed to one national list maintained by the government.

Congress made several relevant findings at the beginning of the TCPA, including the conclusions that telemarketing—specifically the use of automated or prerecorded calls—is both a nuisance and an invasion of privacy and has the potential to disrupt public safety and interstate commerce.³² The Act repeatedly refers to the need to protect individuals’ right of privacy from telemarketing, specifically stating that “residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.”³³

The legislative history of the TCPA also points to privacy violations by telemarketers as the principal concern of Congress when writing the Act. For example, an accompanying Senate report states that “[t]he purposes of the [TCPA] are to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls . . . and to facilitate interstate commerce”³⁴ Additionally, a report from the House Energy and Commerce Committee explains that the purpose of the restrictions is to protect privacy rights.³⁵ Even President George H.W. Bush, who was opposed to increased telecommunications regulations, applauded the Act’s protection of the

³⁰ *Id.*; see *FTC v. Mainstream Mktg. Serv., Inc.*, 345 F.3d 850, 857 (10th Cir. 2003).

³¹ 57 Fed. Reg. 48,333, 48,334 (Oct. 23, 1992) (to be codified at 47 C.F.R. pts. 64 & 68).

³² Telephone Consumer Protection Act of 1991 § 2(5), (10), (13), 105 Stat. at 2394–95. The public safety is presumably endangered when an emergency telephone line is occupied as the result of a telemarketing call. See Cohen & Fier, *supra* note 5.

³³ Telephone Consumer Protection Act of 1991 § 2(10), 105 Stat. at 2394. This finding seemingly conflicts with a separate finding by Congress that the FCC should have the discretion to determine that some types of prerecorded or automated calls, such as those made by nonprofit organizations, are actually not a nuisance or invasion of privacy. See *id.* § 2(13), 105 Stat. at 2395. The distinction between commercial and noncommercial calls is irrelevant when talking about unwanted calls, however, because either way, the telephone ring sounds the same. See Cohen and Fier, *supra* note 5 (citing *Moser v. FCC*, 826 F. Supp. 360, 366 (D. Or. 1993)).

³⁴ S. REP. NO. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1968. The Report comes from the Commerce, Science, and Transportation Committee. *Id.*

³⁵ H.R. REP. NO. 102-317, at 5 (1992).

privacy rights of telephone users.³⁶

The Senate Report goes on to explain that advances in technology had made automated calling more cost-effective and prevalent, and the vast majority of Americans desired regulations.³⁷ In fact, fifty percent of those who wanted regulations in 1991 favored prohibiting all unsolicited calls.³⁸ Furthermore, the House Report states that the purpose of the TCPA was to return "a measure of control" to residential telephone customers,³⁹ and that residential subscribers object to unwanted calls for two reasons: (1) there are too many, and (2) they are often unexpected calls from organizations with which the individual has had no prior contact.⁴⁰

Given Congress's obvious concern for general privacy rights and its desire to respond to the remarkable will of a public angered by unwelcome calls, it seems contradictory that the TCPA should exempt nonprofit callers from its prohibitions and thus allow these callers to continue to invade individual privacy. These exemptions, however, were the result of Congress's fear that do-not-call regulations for charities and political groups would be an unconstitutional infringement of these groups' free speech rights.⁴¹

However, this decision to exclude noncommercial organizations from regulation was also thought by Congress to be potentially unconstitutional.⁴² The concern was that an FCC rule that applied to commercial calls only would unconstitutionally distinguish between types of speech based solely on the content of the message.⁴³ This argument was dismissed, however, on the grounds that a distinction between commercial and nonprofit calls is valid because nonprofit

³⁶ Statement by President George Bush upon Signing S. 1462, 27 WEEKLY COMP. PRES. DOC. 1877 (Dec. 20, 1991), *reprinted in* 1991 U.S.C.C.A.N. 1979, 1979.

³⁷ S. REP. NO. 102-178, at 2-3, *reprinted in* 1991 U.S.C.A.A.N. 1968, 1970.

³⁸ *Id.* at 3. It should be remembered that the focus of the TCPA is on automated and prerecorded calls, and that the real attack on telemarketing did not come until years later with the establishment of the national registry. *See* Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4583 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310).

³⁹ H.R. REP. NO. 102-317, at 6.

⁴⁰ *Id.* at 14.

⁴¹ *Id.* at 17.

⁴² *See id.* at 16-17. This authorization to create discriminatory rules was not Congress's only worry about the constitutionality of the TCPA. The relevant Senate Report speaks to the constitutionality of the actual prohibitions of the Act regarding the use of automated or prerecorded messages. *See* S. REP. NO. 102-178, at 4, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1971. Some commentators had suggested that banning the use of these messages might interfere with free speech, but the Report maintains that the TCPA "does not discriminate based on the content of the message [because] [i]t applies equally whether the automated message is made for commercial, political, charitable or other purposes." *Id.*

⁴³ *See Mainstream Mktg. Serv., Inc.*, 345 F.3d at 857; *Mainstream Mktg. Serv., Inc.*, 358 F.3d at 1238. This notion of content discrimination is discussed in detail *infra* Part III.B.2.

calls are not nearly the nuisance or privacy invasion that commercial calls are.⁴⁴ This conclusion was based on an assumption that commercial calls occur more often than nonprofit calls and are more likely to be made by unexpected organizations.⁴⁵ This assumption addresses what the House Report identified as the main complaints of residential subscribers⁴⁶ and is an argument that was validated twelve years later by the Tenth Circuit Court of Appeals.⁴⁷

B. The Telemarketing and Consumer Fraud and Abuse Prevention Act

The Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFPA) was Congress's next major step in telemarketing restrictions. Just like the TCPA before it, the Act celebrated the importance of privacy as a justification for regulation but continued the exemptions for noncommercial telemarketers. The TCFPA was passed in 1994 in order to ensure that the FTC continued to protect consumers doing business over the telephone.⁴⁸ The Act, however, makes no mention of a national do-not-call list.⁴⁹ Just as the TCPA authorizes the FCC to regulate only commercial telemarketing, the TCFPA authorizes the FTC to make rules pertaining to "telemarketing," which is defined by the Act as a "campaign . . . conducted to induce purchases of goods or services . . ."⁵⁰ Telemarketing for political, charitable, or any noncommercial purposes is again excluded.

Despite these recurrent exemptions for nonprofit telemarketers, the TCFPA touts the protection of privacy as a laudable goal. The Act demands that the FTC issue a rule prohibiting telemarketers from making unsolicited calls "which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."⁵¹ Additionally, the TCFPA requires FTC rules that prohibit

⁴⁴ See H.R. REP. NO. 102-317, at 16.

⁴⁵ See Adler, *supra* note 6.

⁴⁶ See *id.*; *supra* note 35, at 14. The Ninth Circuit in *Moser v. FCC* found no constitutional problem with the Act's distinction between commercial and nonprofit telemarketers. 46 F.3d 970, 974-75 (9th Cir. 1995). The constitutional issues addressed by the legislative history of the TCPA provide an introduction to the same conflict that surrounded the national do-not-call registry in *Mainstream Marketing Services, Inc.*, 358 F.3d at 1236-37; see *infra* Part III.B.2.

⁴⁷ See *Mainstream Mktg. Serv., Inc.*, 345 F.3d at 857; *Mainstream Mktg. Serv., Inc.*, 358 F.3d at 1237. See *infra* Part III.B.2.

⁴⁸ Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, § 2, 108 Stat. 1545, 1545 (1994).

⁴⁹ The TCFPA receives less attention than the TCPA in this Part simply because it does not explain the details of a national registry. For a discussion of the TCFPA's failure to mention a national registry, see *infra* Part III.B.1.

⁵⁰ Telemarketing and Consumer Fraud and Abuse Prevention Act § 7, 108 Stat. at 1550.

⁵¹ *Id.* § 3(a)(3)(A), 108 Stat. at 1545. A portion of the TCFPA also directs the Securities

deceptive and abusive telemarketing, including restrictions on the times unsolicited calls may be made and a stipulation that telemarketers of goods and services must identify the purpose of the call.⁵²

Congress passed the Act after recognizing that telemarketing can easily occur across state lines and with minimal customer contact.⁵³ These factors provide an opportunity for fraud by mobile telemarketing companies that can commit abuses in numerous states.⁵⁴ This leads to three types of victims: buyers who have been duped, credit card companies that often absorb fraudulent charges, and legitimate telemarketing companies that lose business and respect due to the acts of fraudulent operations.⁵⁵ The TCFPA thus seeks to empower the FTC to halt those telemarketing practices designed to defraud, harass, or constrain a consumer's right to privacy.⁵⁶

C. *The 1995 Telemarketing Sales Rule*

In 1995, the FTC responded to its grant of authority under the TCFPA by promulgating the Telemarketing Sales Rule (TSR), a regulation that prohibits abusive telemarketing in order to protect privacy, but simultaneously exempts nonprofit telemarketers.⁵⁷ The TSR of 1995 makes no reference to a national do-not-call list, but does require a variety of fair procedures for telemarketers.⁵⁸ These restrictions were specifically included in order to satisfy the TCFPA's mandate that telemarketers not be permitted to use unsolicited calls to coerce or abuse the reasonable consumer's right to privacy.⁵⁹

Two specific prohibitions were designed to fulfill this requirement. The first

and Exchange Commission (SEC) to promulgate rules similar to those established by the FTC in order to combat telemarketing fraud regarding the trading of securities. *See id.* § 3(d), 108 Stat. at 1546-48.

⁵² *Id.* § 3(a), 108 Stat. at 1545-46.

⁵³ *Id.* § 2(1), 108 Stat. at 1545.

⁵⁴ *Id.*

⁵⁵ H.R. REP. NO. 103-20, at 2 (1993), *reprinted in* 1994 U.S.C.C.A.N. 1626, 1627-28. These losses totaled \$40 billion per year at the time the TCFPA was enacted and were the result of a spectrum of fraudulent sales of everything from rare coins and art to water filters and rubber dinghies. *See id.* at 3; Telemarketing and Consumer Fraud and Abuse Prevention Act § 2(3), 108 Stat. at 1545.

⁵⁶ H.R. REP. NO. 103-20, at 5, *reprinted in* 1994 U.S.C.C.A.N. at 1630.

⁵⁷ Telemarketing Sales Rule, 60 Fed. Reg. 43,842, 43,842-43 (Aug. 23, 1995) (to be codified at 16 C.F.R. pt. 310). Due to the jurisdictional limitations of the FTC, the TSR does not apply to certain entities such as banks, various savings and loan institutions, specific types of federal credit unions, air carriers, or securities dealers. *Id.* at 43,843.

⁵⁸ It is not surprising that the TSR does not mention a national registry considering that the authorizing statute, the TCFPA, does not mention it either. *See infra* Part III.B.1.

⁵⁹ Telemarketing Sales Rule, 60 Fed. Reg. at 43,854.

was a rule that the caller not cause any telephone to ring with the intent to “annoy, abuse, or harass any person at the called number.”⁶⁰ Therefore, telemarketers must disclose the total cost of a transaction and any limitations or conditions on the purchase *before* the customer pays.⁶¹ Telemarketers must also promptly and clearly reveal the identity of the seller, the purpose of the call, the nature of what is being sold, and the fact that no purchase is necessary in order to win a prize.⁶²

The second prohibition designed to protect privacy draws on the company-specific regulations promulgated by the FCC as authorized by the TCPA.⁶³ The TSR requires that telemarketers may not call a person who has previously stated that “he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered.”⁶⁴ This prohibition carries with it strict enforcement provisions to be exacted by the FTC, the states, or any person suffering more than \$50,000 in actual damages caused by violations of the rule.⁶⁵

Before promulgating this company-specific aspect of the rule, the FTC received comments indicating that the requirement would cause undue compliance burdens in that businesses would need to maintain an FCC company-specific do-not-call list and a separate FTC list. The agency clarified, however, that only one list of customers not to call need be maintained.⁶⁶ Commenters also

⁶⁰ *Id.* Some commenters suggested that this attention to the caller’s intent does not adequately respond to the TCFPA’s focus on what the recipient of the call considers reasonable. The FTC responded, however, that the intent language is directly taken from the Fair Debt Collection Practices Act (FDCPA), an item of legislation that the TCFPA instructs the FTC to “draw upon” when promulgating the TSR. *Id.* at 43,853–54; see Fair Debt Collection Practices Act, 15 U.S.C. § 1692(d)(5) (2000). In practice, the intent of the caller to annoy, abuse, or harass is simply presumed if the calls are made “continuously” or “repeatedly” as defined by the FDCPA. Telemarketing Sales Rule, 60 Fed. Reg. at 43,854.

⁶¹ *Id.* at 43,865.

⁶² *Id.* at 43,866–67.

⁶³ *Id.* at 43,854–55.

⁶⁴ *Id.* at 43,866. One respect in which the FTC company-specific do-not-call requirements are different from those of the FCC is that the FTC rules provide safe harbors. Safe harbors prevent liability under this provision if the telemarketer (1) has written procedures to comply with the requirement, (2) trains personnel in these procedures, (3) maintains a do-not-call list, and (4) the call is the result of error. *Id.*

⁶⁵ Telemarketing Sales Rule, 60 Fed. Reg. at 43,855, n.133 (citing 15 U.S.C. § 6102(c), 6103, 6104 (2000)). These enforcement measures differ from the FCC’s enforcement of company-specific do-not-call requirements. The TCPA, the act that authorizes the FCC to restrict commercial telemarketing, can only be enforced in state court by a private individual “who receives more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the FCC’s regulation.” *Id.* (citing 47 U.S.C. § 227(c)(5)).

⁶⁶ *Id.* at 43,855. One comment suggested to no avail that the do-not-call procedure should apply to goods rather than a seller. This would allow a consumer to request no more calls regarding a particular product such as termite control, while retaining the ability to receive calls

questioned what would be required of an individual in order to be placed on the list, to which the FTC responded that any form of request should be sufficient.⁶⁷ Despite not mentioning a national do-not-call registry, the TSR of 1995 and its company-specific do-not-call list requirement proved later to be the FTC's initial step toward creating a national registry in 2003.⁶⁸

D. *The 2003 Amended Telemarketing Sales Rule*

In 2003, the FTC amended the TSR in order to establish a national do-not-call registry that the commission believed would best respond to concerns regarding the original rule's ineffective protection of consumers' right to privacy.⁶⁹ The amended TSR makes it an abusive telemarketing practice for a commercial telemarketer to call an individual when "that person's telephone number is on the 'do-not-call' registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services"⁷⁰ Failure to comply with this requirement carries a fine of up to \$11,000 for each violation.⁷¹ Just as with the TSR of 1995, however, there are still exemptions for calls made by organizations that have the permission of the call recipient, organizations that have an "established business relationship" with the call recipient,⁷² and nonprofit tax-exempt organizations such as charities

regarding deck treatment from the same seller. The FTC disagreed without explanation. *See id.*

⁶⁷ *Id.* A request could be as simple as an oral indication such as, "Do not call again." *Id.*

⁶⁸ Legislative history does not reveal whether this progression toward a national registry was planned.

⁶⁹ *See* Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4581–82 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310). Specifically, commenters pointed to three changes in the marketplace that were causing the TSR of 1995 to be less effective: "[1] increased consumer concern about personal privacy, [2] the development of novel payment methods, and [3] the increased use of pre-acquired account telemarketing and upselling." *Id.* at 4581–82 (citations omitted). The fear regarding novel payment methods such as through electronic commerce is that customers will be subject to unauthorized charges. Compounding these claims of unauthorized charges is the prevalence of pre-acquired account telemarketing, where the caller actually possesses the customer's billing information before even making the call, and "upselling," where customers are given the option to make more purchases following the completion of the first transaction. *Id.* at 4581–82 nn.25–27.

⁷⁰ 16 C.F.R. § 310.4(b)(1)(iii)(B) (2003) *reprinted in* 68 Fed. Reg. 4580, 4672 (Jan. 29, 2003).

⁷¹ *See* Jube Shiver, Jr., 'Do-Not-Call' Effort Becomes Convolved, L.A. TIMES, Oct. 1, 2003, at C1.

⁷² The FTC states, however, that even if an "established business relationship" exists, if the consumer asks to be placed on the company-specific do-not-call list, the seller must comply. Telemarketing Sales Rule, 68 Fed. Reg. at 4629.

and political groups.⁷³ Despite this exception for nonprofit groups, however, the amended TSR does require that telemarketers making calls on behalf of charities comply with the company-specific do-not-call requirement.⁷⁴

The response to the FTC's notice of proposed rulemaking regarding the amended TSR was considerable. The FTC received about 64,000 comments, and a significantly large portion referred to the do-not-call registry.⁷⁵ The comments were concerned with a range of registry-related issues such as whether the FTC had the authority to create a national list,⁷⁶ whether the registry would unconstitutionally restrict free speech, and whether the proposed system was necessary to protect consumer privacy.⁷⁷ Despite these concerns, the FTC proceeded with the do-not-call list.

The national registry was created in large part because the company-specific regulations of the original TSR were not having their desired effect.⁷⁸ Consumer groups and state law enforcement representatives lodged a series of complaints, including the burden of having to make a do-not-call request in response to every caller, the fact that the requests are often ignored, and the lack of a way for individuals to verify that their names had been added to a list.⁷⁹ The telemarketing industry countered that company-specific lists are a more cost-effective system, but the Commission decided that unlike the company-specific approach, a national list would adequately protect consumers' privacy.⁸⁰

A major goal of the Commission in creating the national registry was to maintain an adequate balance between ensuring consumer privacy and allowing sellers to be able to contact existing and prospective customers.⁸¹ It is a goal that coincides with a finding that was made by Congress when enacting the TCPA in 1991: "Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy

⁷³ See 16 C.F.R. § 310.4(b)(1)(iii)(A), (B) reprinted in 68 Fed. Reg. 4580, 4672 (Jan. 29, 2003).

⁷⁴ Telemarketing Sales Rule, 68 Fed. Reg. at 4629.

⁷⁵ *Id.* at 4628 n.574.

⁷⁶ See *infra* Part III.B.1.

⁷⁷ Telemarketing Sales Rule, 68 Fed. Reg. at 4629.

⁷⁸ *Id.* at 4629. An additional problem not addressed by company-specific provisions is that several initial calls can be burdensome and an invasion of privacy. See *id.* at 4629–30.

⁷⁹ *Id.* Commenters also took issue with the enforcement mechanism of a private right of action because it required the individual consumer-victim to bear the burden of recording necessary evidence such as what organizations were calling and when. See *id.*

⁸⁰ *Id.* at 4631.

⁸¹ Telemarketing Sales Rule, 68 Fed. Reg. at 4629. The FTC argues that allowing an exception for "established business relationships" does well to secure this balance. *Id.*

of individuals and permits legitimate telemarketing practices.”⁸² The amended TSR reveals that the FTC believes that a single national registry is the best way to accommodate this balance.

E. *The Do-Not-Call Implementation Act*

The Do-Not-Call Implementation Act is a relatively short piece of legislation passed in March of 2003 that does not mention the right to privacy or exemptions for nonprofit telemarketers, but does authorize the FTC to promulgate regulations instituting fees needed to operate and enforce the do-not-call registry.⁸³ The Act is an attempt by Congress to ensure that the do-not-call efforts of the FTC and FCC are coordinated and that contradictions in rules between the two agencies are identified and remedied.⁸⁴ The legislative history of the Act reveals that conflicts between FTC rules, FCC rules, and state do-not-call lists are a major concern of Congress.⁸⁵ A House Energy and Commerce Report discloses that Congress desires a simple national program but recognizes the opportunity for complication due to “regulatory duplication,” possible preemption of state law, and simultaneous authority conferred on two agencies.⁸⁶ The Do-Not-Call Implementation Act simply refocuses agency and state attention on the declared goal of one national list.⁸⁷

⁸² Telephone Consumer Protection Act § 2(9), 105 Stat. at 2394. How this balance is properly achieved is a question that should be asked in regard to each development in technology that the telemarketing industry implements. For example, the regulation of 1-900 numbers, unsolicited live calls, autodialed calls, prerecorded calls, and non-consensual telemarketer use of Caller ID have all been analyzed from the perspective of whether rules regarding new technology keep the balance in mind. See Consuelo Lauda Kertz & Lisa Boardman Burnette, *Telemarketing Tug-of-War: Balancing Telephone Information Technology and the First Amendment with Consumer Protection and Privacy*, 43 SYRACUSE L. REV. 1029, 1041-55, 1060-65, 1067-71 (1992).

⁸³ Do-Not-Call Implementation Act, Pub. L. No. 108-10, § 2, 117 Stat. 557, 557 (2003).

⁸⁴ See *id.* § 4, 117 Stat. at 558. For example, the FTC rule provides that a telemarketer does not violate the prohibition against “abandoned” calls as long as it leaves a recorded message. This is a conflict because the TCPA prohibits telemarketers from leaving recorded messages. See H.R. REP. NO. 108-8, at 4 (2003).

⁸⁵ *Id.* at 3.

⁸⁶ *Id.* at 4-5.

⁸⁷ Although not vital to the history of do-not-call legislation and regulation, the Do-Not-Call Implementation Act was central to the FTC’s argument in *U.S. Security v. FTC* that the agency was in fact authorized by Congress to create a national list. 282 F. Supp. 2d 1285, 1291 (W.D. Okla. 2003); see *infra* Part III.B.1.

F. The 2003 FCC Rules and Regulations

Not to be outdone by the FTC, the FCC finally decided in its 2003 FCC Rules and Regulations that a national do-not-call registry that exempts nonprofit telemarketers is the most effective and cost-efficient way to protect consumer privacy.⁸⁸ It was a decision that came some twelve years after the commission was authorized to do so under the TCPA.⁸⁹ The 2003 FCC rules announce the FCC's plan to work with the FTC to establish a national do-not-call registry in order to supplement the company-specific regulations of the old FCC rules and "enhance the privacy interests of those consumers that do not wish to receive telephone solicitations."⁹⁰ In effect, the FCC rules are very similar to the FTC rules, but are able to cover companies outside the FTC's jurisdiction such as common carriers and banks.⁹¹

The reasons the FCC cited for changing its mind in terms of the need for a national registry were cost, accuracy, and privacy.⁹² The Commission pointed to the fact that advances in computer technology had decreased the estimated cost of establishing the list from \$80 million in 1992 to \$18.1 million in 2003.⁹³ Additionally, the list would now be updated every month to remove disconnected numbers, and the privacy of registrants would be ensured by restricting information on the list to telephone numbers only.⁹⁴ The result is a coordinated effort by the FCC and FTC to protect consumer privacy by maintaining a national registry of telephone numbers that cannot be called by commercial telemarketers.⁹⁵

⁸⁸ See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 68 Fed. Reg. 44,144, 44,144-45 (July 25, 2003) (to be codified at 47 C.F.R. pts. 64 & 68).

⁸⁹ *Id.* at 44,144.

⁹⁰ *Id.* at 44,145.

⁹¹ *Id.* at 44,145; see also *Telemarketers, Public on Hold Over Status of Do-Not-Call List*, *supra* note 22.

⁹² Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 68 Fed. Reg. at 44,145-46.

⁹³ *Id.* at 44,146.

⁹⁴ *Id.* A decrease in cost is a logical reason for the change in the FCC's approach to the list, but it is doubtful that the accuracy and privacy of the list were significant factors impeding its development considering these elements could easily have been accommodated in the original FCC rule.

⁹⁵ *Id.* at 44,145; see also Barnaby J. Feder, *U.S. Issues Rules to Curb Forms of Telemarketing*, N.Y. TIMES, Dec. 19, 2002, at C2.

III. THE INDUSTRY RESPONSE

The telemarketing industry has shown its disdain for the national do-not-call list by continually attacking the registry both in the public arena and in court.⁹⁶ Telemarketers continue to observe the list for fear of sanction, but the billion-dollar industry has not welcomed the do-not-call efforts of an annoyed public and its somewhat responsive government.⁹⁷ Attempts to convince the public and the courts that the list is unwarranted, however, have been ineffective.⁹⁸

⁹⁶ The industry's most immediate response, however, was compliance. See Shiver, *supra* note 71. Over 400 companies accessed the list in the first month it was available, and this included telemarketing giants such as banks and airlines. See *id.* This reaction was appropriate considering government agencies were anxious to enforce the list. Only three months after the registry became available, the FCC responded to eight complaints by citing, but not fining, a California mortgage company for calling registered numbers. See *Regulators Issue First Citation for Violation of No-Call Law*, N.Y. TIMES, Dec. 19, 2003, at C9. The FCC even became serious about finally enforcing the company-specific do-not-call lists that were authorized by the TCPA a decade before. See Matt Richtel, *Telemarketing Fine Proposed for AT&T*, N.Y. TIMES, Nov. 4, 2003, at C4. On November 3, 2003, the FCC proposed a \$780,000 fine against AT&T for contacting individuals who specifically asked the telephone carrier to stop calling. The amount was eventually reduced to \$490,000, but nevertheless, it was the first time the agency had suggested a fine for a violation of a company-specific list. *Id.*; *AT&T to Pay \$490,000 for Do-Not-Call Violations*, N.Y. TIMES, July 10, 2004, at C4.

⁹⁷ Telemarketers are not the only businesses that fear a national do-not-call list. Companies that engage in spamming, the practice of sending unsolicited emails, are worried that a national do-not-spam list is next. See Wayne Washington, *Bush Signs Anti-Spam E-mail Bill*, BOSTON GLOBE, Dec. 17, 2003, at A2; see also David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 BUFF. L. REV. 1001, 1031-32 (1997) (suggesting that the TCPA if read broadly could actually apply to unsolicited email, and that the best approach is some type of "universal exclusion list"). On December 16, 2003, President George W. Bush signed anti-spam legislation that permits consumers to tell spammers to stop sending unsolicited email. The legislation authorized the FTC to study whether a national do-not-spam list would be effective, but the Commission concluded that a "do-not-email list" is not currently a workable solution because spammers are already able to avoid identification and would most likely ignore the list. See Jennifer Lee, *Bush Signs Law Placing Curbs on Bulk Commercial E-Mail*, N.Y. TIMES, Dec. 17, 2003, at C4; Saul Hansell, *F.T.C. Rebuffs Plan to Create No-Spam List*, N.Y. TIMES, June 16, 2004, at C1.

⁹⁸ See *infra* Parts III.A-B. Interestingly, the industry's attempt to discredit the list seems to conflict with statements by telemarketing representatives that no company wants to waste time calling individuals who do not want to be contacted. See Telemarketing Sales Rule, 68 Fed. Reg. at 4632. See also David Stout, *Court Upholds Telemarketing Restrictions*, N.Y. TIMES, Feb. 18, 2004, at C3 (quoting H. Robert Wientzen, president of the Direct Marketing Association, as saying, "If people don't want to be called, we don't want to call them"). Analysts, however, argue that telemarketers have an incentive to call often because it is "rational for a telemarketer to disturb thirty people if he or she can succeed in making a high-profit sale to the thirty-first." Ian Ayres & Matthew Funk, *Marketing Privacy*, 20 YALE J. ON REG. 77, 79 (2003).

A. Swaying Public Opinion

The American Telemarketing Association (ATA) advances several public arguments in opposition to the registry, the most practical being the estimated financial impact. The industry forecast continues to be that a federal list will cause two million telemarketing employees to lose their jobs.⁹⁹ This speculation, although somewhat hyperbolized, is made more alarming by the fact that the typical employee doing telemarketing is a minority who did not graduate from college and has few skills to bring to the labor market.¹⁰⁰

Additionally, it is not just employees and sales that the industry claims will be lost. Telemarketing has created numerous separate markets that could also falter.¹⁰¹ Participants in these markets include businesses that develop software to improve telemarketing databases and other businesses that sell these databases containing information on individuals' lifestyles and buying habits.¹⁰² There even exists a "confirmation" market designed to update these collections of information and account for changes in valuable data such as addresses, telephone numbers, births, and deaths.¹⁰³

If telemarketing revenue does suffer as a result of the national registry, the industry claims that small businesses will be hurt the most.¹⁰⁴ Telemarketing is a relatively inexpensive means of promoting a product and is therefore a valued advertising and sales technique for small businesses.¹⁰⁵ If the practice is no longer viable, however, large operations will be able to resort to more expensive advertising and pass the costs on to consumers, but small businesses will not be able to shift these expenses.¹⁰⁶ Furthermore, if small businesses do manage to continue producing, they will still be negatively affected by the price of obtaining

⁹⁹ See Brian Kates, *No Calls Means No Jobs*, N.Y. DAILY NEWS, July 13, 2003, at 13, available at <http://www.ataconnect.org/ataconnect.org-asp/newsreleases.asp>. Government officials counter that a loss of two million employees would cause the national unemployment rate to rise to a depression level of above 6.4% and is therefore very unlikely. *Id.* However, examples can be found, such as bankrupt telecommunications company WorldCom, which claimed that it was forced to cut 4,000 jobs because of the registry. *WorldCom Plans to Eliminate 4,000 Jobs*, N.Y. TIMES, Mar. 27, 2004, at C4.

¹⁰⁰ Buchanan, *supra* note 15. The ATA reports that 26% of telemarketers are single mothers, 60% are minorities, 95% did not graduate college, and 30% have been on welfare. See *id.*

¹⁰¹ See H.R. REP. NO. 102-317, at 7 (1991).

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See Adler, *supra* note 6.

¹⁰⁵ See Buchanan, *supra* note 15.

¹⁰⁶ See *id.*

the list of telephone numbers that they are not permitted to call.¹⁰⁷ The result, according to a telemarketing industry trade group known as the Direct Marketing Association (DMA), will be a federal program funded significantly by small-business dollars that is more expensive and less effective than the DMA's own self-regulated do-not-call list procedures.¹⁰⁸

The industry also has complaints regarding logistics and feasibility. For example, the DMA claims that the national registry itself is subject to misuse and exploitation as is evident by the addition of several DMA executives' telephone numbers to the list without their knowledge.¹⁰⁹ The numbers were presumably added in order to embarrass the organization, but the DMA used the stunt as an example of the difficulty of properly monitoring such a large database.¹¹⁰ Businesses argue that updated versions of the list cannot realistically be enforced until significant time passes because it can take up to three months for a blocked telephone number to be brought to the attention of the callers.¹¹¹ Telemarketers therefore claim they are at risk for being in constant violation because the database involves millions of telephone numbers, is difficult to maintain with accuracy, and has a propensity for being outdated and incorrect.¹¹²

Finally, some commentators predict that telemarketing activity will not diminish as a result of the registry, but will simply change.¹¹³ For example, more

¹⁰⁷ See Adler, *supra* note 6. Telemarketers are required to download the list at least every three months at a cost of \$25 per area code or \$7,325 for the entire country. See Richtel, *supra* note 23. The first five area codes are free, but it is hard to know at what point it becomes more economical to pay for the entire country instead of one area code at a time. The most recent data from the FCC is dated June 1, 1999, at which time there were only 215 area codes currently in service with a possibility of 70 new ones needed by 2001. FCC, *Area Codes; Frequently Asked Questions*, available at http://www.fcc.gov/Bureaus/Common_Carrier/Factsheets/areacode.html (last visited Sept. 5, 2004).

¹⁰⁸ Feder, *supra* note 5; H.R. REP. NO. 108-8, at 2 (2003). The DMA's self-regulated list is known as the Telephone Preference Service (TPS) and provides telemarketers with the telephone numbers of individuals who do not want to be called. H.R. REP. NO. 108-8, at 2 (2003). Commentators have called the TPS appealing but lament that it can only be used to stop commercial callers because only commercial callers participate. Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 YALE J. ON REG. 99, 119-20 (1986). The TPS is also troublesome because it is voluntary and more than a quarter of telemarketers do not believe the industry is capable of regulating itself. *Id.* at 120 (citing a survey in which twenty-seven percent of telemarketers thought their colleagues were unable to regulate themselves).

¹⁰⁹ See Feder, *supra* note 5.

¹¹⁰ See *id.*

¹¹¹ See Richtel, *supra* note 23.

¹¹² See Adler, *supra* note 6.

¹¹³ See Bernard Stamler, *Accountability; the Gray Area for Nonprofits, Where Legal is Questionable*, N.Y. TIMES, Nov. 17, 2003, at F1.

telemarketing companies will solicit small public charities for work because nonprofit organizations are exempt from the current restrictions.¹¹⁴ The exemptions allow companies to raise money on behalf of the charity at no cost, but for a high percentage of the donated funds.¹¹⁵ If this becomes the case, the callers will not stop; they will simply solicit donations instead of sales.

B. *Swaying Judicial Opinion*

Practical arguments may sway public opinion, but the battles that have garnered the most success, albeit fleeting, for telemarketers have been in the courtroom. The industry has argued both that the FTC does not have the authority to create a national list and also that the list that was created unconstitutionally distinguishes between commercial and noncommercial telemarketers for no legitimate reason.¹¹⁶ These arguments, however, have been extinguished by the efforts of Congress and the Tenth Circuit Court of Appeals to clarify the limits of FTC authority and the First Amendment.

1. *The Limits of FTC Authority*

The first ephemeral victory for telemarketers came in Oklahoma where a Western District judge ruled that the FTC did not have congressional authority under the TCFPA to establish a national do-not-call registry.¹¹⁷ The FTC argued that even though the TCFPA did not mention the express power of the FTC to administer the registry, the Act did authorize the agency to proscribe deceptive and abusive telemarketing, and this must include calls made to individuals who have registered their telephone number with the national list.¹¹⁸ The court disagreed, however, and found that only the FCC, as authorized by the TCPA, had the authority that the FTC claimed.¹¹⁹ Congress quickly responded to the

¹¹⁴ *See id.*

¹¹⁵ The charities generally receive about ten percent of the donated funds. *See id.*

¹¹⁶ *See U.S. Security v. FTC*, 282 F. Supp. 2d 1285, 1290–91 (W.D. Okla. 2003); *Mainstream Mktg. Serv., Inc.*, 358 F.3d 1228, 1240–41 (10th Cir. 2004).

¹¹⁷ *U.S. Security*, 282 F. Supp. 2d at 1291.

¹¹⁸ *Id.* at 1290–91; *Do-Not-Call Registry Back on Track, for Now*, 7 TELECOMM. INDUSTRY LITIG. REP. No. 10, Oct. 21, 2003, at 4.

¹¹⁹ *U.S. Security*, 282 F. Supp. 2d at 1291. This ruling is surprising considering the court acknowledged that Congress expressly authorized the FTC to “collect fees for the implementation and enforcement of a ‘do-not-call’ registry in the Do-Not-Call Implementation Act.” *Id.* at 1291; *Do-Not-Call Implementation Act* § 2. *See supra* Part II.E. The court explained that the Do-Not-Call Implementation Act may recognize that the FTC has created a registry, but it does not recognize that the agency had authority to do so. *U.S. Security*, 282 F. Supp. 2d at 1292.

decision with a short piece of legislation that did nothing but expressly recognize the authority of the FTC as granted by the TCFPA to “implement and enforce a national do-not-call registry.”¹²⁰

2. *The Limits of the First Amendment*

The same day that Congress formally recognized the authority of the FTC to administer a national do-not-call list, a district court in Colorado enjoined the agency from enforcing the list on grounds that the regulations unconstitutionally burden commercial speech based solely on the content of the message.¹²¹ The Court of Appeals for the Tenth Circuit soon after lifted the injunction, citing the FTC’s likelihood of success on the merits, and the Commission did win on appeal.¹²² But despite these victories at the appellate level, the logic of the district

¹²⁰ Act of Sept. 29, 2003, Pub. L. No. 108-82, 117 Stat. 1006. This law was official a mere six days after the court made its ruling in *U.S. Security*. House Energy and Commerce Committee chairman Billy Tauzin, a Republican from Louisiana who introduced the bill, joked that the law should be called the “This Time We Really Mean It” Act so that it would not be misinterpreted by the courts. *Telemarketers, Public on Hold over Status of Do-Not-Call List*, 7 TELECOMM. INDUSTRY LITIG. REP. No. 9, Oct. 7, 2003, at 3. The bill passed 412-8 in the House and 95-0 in the Senate. *Id.*

¹²¹ *Mainstream Mktg. Serv., Inc.*, 283 F. Supp. 2d at 1168. The First Amendment has long come to the aid of society’s disfavored ilk—including the Ku Klux Klan and Nazis (see, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 444 (1969); *Nat’l Socialist Party of America v. Village of Skokie*, 432 US 43, 44 (1977))—but for some, its use in defense of telemarketers is particularly outrageous. In the wake of the district court’s ruling against the FTC, columnist Ellen Goodman disparagingly asked, “You want to tell me that a telemarketer has a constitutional right to interrupt my dinner with an offer to corrugate my roof?” Ellen Goodman, *A Right to Make Annoying Calls?*, BOSTON GLOBE, Oct. 2, 2003, at A17.

¹²² This case concerns the FTC regulations only, but it should be remembered that the FCC also has regulations governing the national registry. Following the district court’s initial decision to enjoin the list on September 25, 2003, the FTC moved the district court for an emergency stay pending appeal. See *Mainstream Mktg. Serv., Inc. v. FTC*, 284 F. Supp. 2d 1266, 1268 (D. Colo. 2003). In support, the FTC pointed to a Tenth Circuit decision of September 26, 2003 involving the same telemarketing companies as plaintiffs and the FCC, as opposed to the FTC, as the defendant. See *id.* at 1276–77. The Tenth Circuit had declined to grant a stay of the FCC’s rules regarding the national list after determining that the telemarketers were unlikely to succeed on the merits, and the FTC argued that the district court should follow the intents and purposes of the appellate court’s decision. See *id.*; *Mainstream Mktg. Serv., Inc. v. FCC*, No. 03-9571, 2003 U.S. App. LEXIS 20067, at *3–4 (10th Cir. Sept. 26, 2003) (unreported); *Do-Not-Call Registry Back on Track, for Now*, *supra* note 118. The district court declined, however, and instead ruled in favor of the injunction of the FTC rules, citing the fact that the district court had the benefit of being briefed on the merits of the case with regard to the FTC whereas the appellate court had not with regard to the FCC. *Mainstream Mktg. Serv., Inc.*, 284 F. Supp. 2d at 1277. There was some speculation that the FTC, the agency in charge of actually collecting and managing the list of prohibited telephone numbers, would simply give the list to the FCC for enforcement, but the court warned that any attempt by

court's ruling suggests a sound reason why the constitutionality of the list is suspect.¹²³

The thrust of the district court's opinion in *Mainstream Marketing Services, Inc., v. FTC* is that the government may not restrict commercial speech without materially advancing a substantial government interest.¹²⁴ While it is true that the national registry advances the protection of privacy and the prevention of telemarketing abuse, two government interests that are substantial, these interests have nothing to do with the content of the telemarketing call, and therefore a distinction based on that content violates the First Amendment.¹²⁵

The decision relies in large part on the framework that the U.S. Supreme Court established for applying the First Amendment to commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.¹²⁶ In *Central Hudson*, the Court explained that commercial speech, defined as "speech proposing a commercial transaction" and "expression related solely to the economic interests of the speaker and its audience," is definitely protected by the First Amendment from unjustifiable government regulation, but is afforded less protection than other types of speech.¹²⁷ The result of this principle is that

the FTC to bypass the injunction would be seen as a violation of the order. See *id.* The minor distinctions between the FTC regulations and the FCC regulations are irrelevant to a discussion of the list as a violation of the First Amendment, however, because both agencies and the statutes that authorize them provide the potentially unconstitutional distinction between commercial telemarketers and nonprofit tax-exempt telemarketers. See *supra* Parts II.A–F.

¹²³ The ATA has decided to appeal the case to the U.S. Supreme Court, but the Court denied certiorari. *Mainstream Mktg. Serv., Inc. v. FTC*, No. 03-1552, 2004 U.S. LEXIS 5564 (U.S. Oct. 4, 2004). Interestingly, the DMA has decided not to pursue the case to the high court, citing the need at some point "to listen to the desires of the consumer." See Jube Shiver, 2 *Groups Split on No-Call Registry*, L.A. TIMES, Mar. 4, 2004, at C1.

¹²⁴ See *Mainstream Mktg. Serv., Inc.*, 283 F. Supp. 2d at 1168.

¹²⁵ *Id.* Robert Corn-Revere, an attorney who represented the two telemarketing companies and the ATA in the case, summed up this assertion by saying, "A ringing phone is a ringing phone. . . . You don't regulate commercial speech differently if the problem you seek to regulate has nothing to do with the commercial nature of the speech." Liptak, *supra* note 7. It is a conclusion that has support in the legal community. University of Chicago law professor Geoffrey R. Stone, for example, called the judgment "a perfectly reasonable decision." *Id.*

¹²⁶ 447 U.S. 557, 566 (1980). In *Central Hudson*, the national energy crisis of the early 1970s prompted the New York Public Service Commission to ban all promotional advertising by the area utility company so as not to encourage energy use. The company objected on First Amendment grounds, and the Supreme Court found that the State's interest in energy conservation was directly advanced by the Commission's order, but that the complete suppression of commercial speech was more extensive than necessary to further that interest. See *id.* at 569–70.

¹²⁷ *Id.* at 561–63. The Court explained what justifies this disparate treatment in *Ohrlik v. Ohio State Bar Association*, 436 U.S. 447, 455–56 (1978). "[C]ommon sense" dictates that commercial speech has a "subordinate position in the scale of First Amendment values . . ." *Id.* The case involved a lawyer who improperly solicited a client in violation of the Ohio Code of

commercial telemarketing, which all parties to the litigation agreed is commercial speech, receives less protection under the First Amendment than speech that occurs when political or charitable organizations make unwanted calls.¹²⁸

The Court in *Central Hudson* articulated a four-part analysis for determining when commercial speech may be regulated by the government, and it is the application of this test that caused disagreement between the Colorado District Court and the Tenth Circuit Court of Appeals in *Mainstream Marketing Services, Inc.*¹²⁹ Commercial speech may be regulated if (1) the speech concerns lawful activity and is not misleading, (2) the government interest asserted in support of the regulation is substantial, (3) the regulation materially advances the government interest, and (4) the regulations are "not more extensive than is necessary to serve that interest."¹³⁰

The first element of the analysis—that the commercial speech must be lawful and not misleading—is unlike the subsequent three elements because it is an obstacle that the commercial speaker must overcome, as opposed to something that must be affirmatively proven by the government. If the commercial speech is deceitful or involves illegal activity, then the First Amendment does not bar its suppression.¹³¹ There is little doubt, however, that the FTC rules at issue

Professional Responsibility and unsuccessfully claimed his actions were protected by the First Amendment. *Id.* at 453. In dicta the Court stated, "To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Id.* at 456.

¹²⁸ See *Cent. Hudson*, 447 U.S. at 562–63; see also *Village of Schaumburg v. Citizens for a Better Env't.*, 444 U.S. 620, 632 (1980). In *Schaumburg*, a municipal ordinance that prohibited charities from soliciting funds if they failed to use at least seventy-five percent of the money for "charitable purposes" was held unconstitutional for not being narrowly tailored to the village's interest "in protecting the public from fraud, crime and undue annoyance." *Id.* at 622, 636. It is not illogical to suggest that a solicitation by a charity or political group is merely a type of commercial speech that involves a slightly different kind of commercial transaction. However, the Court in *Schaumburg* rejected this argument, instead holding that because the solicitation is so intertwined with "particular causes or . . . particular views on economic, political, or social issues," it is not considered a type of commercial speech. *Id.* at 632.

¹²⁹ Compare *Mainstream Mktg. Serv., Inc.*, 345 F.3d at 859, with *Mainstream Mktg. Serv., Inc.*, 283 F. Supp. 2d at 1168.

¹³⁰ *Cent. Hudson*, 447 U.S. at 566. The *Central Hudson* test has been referred to by the Supreme Court as requiring an "intermediate" scrutiny analysis of government restrictions, a standard that is more rigorous than a "rational basis" review and that does not permit the Court to consider other factors beyond the precise interests put forward by the state. See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995) (holding that a rule of the Florida Bar that prohibited attorneys from soliciting accident victims before thirty days following the accident was not a violation of the First Amendment because the narrowly tailored rule materially advanced the Bar's substantial interest in protecting accident victims from invasive attorneys). *Id.* at 635.

¹³¹ *Cent. Hudson*, 447 U.S. at 563–64.

concerned truthful, accurate telemarketing designed to “induce the purchase of goods and services.”¹³²

What the district court identified as a “more troubling question,” and one that easily could have been decided in the FTC’s favor, is the notion that the First Amendment does not even apply to the do-not-call list because the national registry is not a “government restriction” of speech.¹³³ This argument proposes that it is the individual who chooses to register a telephone number with the list, not the government, and logically it is the individual who therefore chooses to ban commercial speech.¹³⁴ Additionally, an individual who registers a telephone number still retains the right under both FTC and FCC rules to demand that unwanted charitable and political callers add the call recipient to their company-specific do-not-call lists.¹³⁵

The district court rejected this line of reasoning, however, instead finding that the government’s “content-based limitation on what the consumer may ban from [the] home” denies the individual the autonomy to make a personal choice concerning what types of calls should be exempted.¹³⁶ It was a level of

¹³² *Mainstream Mktg. Serv., Inc.*, 283 F. Supp. 2d at 1162 (citing 16 C.F.R. § 310.4(b)(1)(iii)(B)).

¹³³ *Mainstream Mktg. Serv., Inc.*, 283 F. Supp. 2d at 1162.

¹³⁴ *Id.*

¹³⁵ See Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4629 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310).

¹³⁶ *Mainstream Mktg. Serv., Inc.*, 283 F. Supp. 2d at 1163. As authority for its decision the court pointed to the Supreme Court’s opinion in *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970). In *Rowan*, a group of mail service organizations unsuccessfully challenged the constitutionality of a statute that permitted individuals a procedure for stopping the receipt of unwanted mailings that the individual determined to be “erotically arousing or sexually provocative.” 397 U.S. at 729–30. The Court held that this statute was constitutional in that “a mailer’s right to communicate must stop at the mailbox of an unreceptive addressee.” *Id.* at 736–37. The FTC used this case to argue that where the government provides individuals a mechanism to decide what may enter the home, it is the individual and not the government that is truly making the decision, and thus the government is not restricting speech. *Mainstream Mktg. Serv., Inc.*, 283 F. Supp. 2d at 1163. The district court, however, saw *Rowan* as an example of a government mechanism that provided for maximum individual autonomy in choosing which material may be received. *Id.* Despite the fact that the statute in *Rowan* refers to sexually explicit material, the Court had found that “[i]n operative effect the power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalog because he objects to the contents—or indeed the text of the language touting the merchandise.” *Rowan*, 397 U.S. at 737. Because Congress, in writing the statute at issue in *Rowan*, had purposely given the mail recipient full discretion to refuse all mail so as to avoid constitutional questions that might arise if it was the government that was making the decision about what was sexually explicit, the district court in *Mainstream Marketing Services, Inc.* determined that the individual’s lack of autonomy under the national registry to reject nonprofit callers warranted treating the regulations as a “government restriction.” *Mainstream Mktg. Serv., Inc.*, 283 F. Supp. 2d at 1163; see *Rowan*, 397 U.S. at 738.

government “entanglement” that the court felt constituted a “government restriction” that implicates the First Amendment.¹³⁷

To satisfy the second step of the *Central Hudson* test—that the asserted government interest be substantial—the FTC presented two government interests in support of the national registry that can be seen consistently throughout the authorizing statutes and the regulations themselves: (1) the cessation of deceptive and abusive telemarketing and (2) the protection of privacy.¹³⁸ Both the District Court and the Tenth Circuit agreed that these government interests are substantial.¹³⁹

The central point of dissention, and the reason why the district court found the national registry unconstitutional, came in the third step of the analysis—the requirement that the regulations must materially advance the substantial government interests. The district court determined that the national registry’s distinction between commercial and noncommercial speech was based solely on content without any justification as to why burdening commercial speech advanced privacy and truthful telemarketing but burdening noncommercial

¹³⁷ *Mainstream Mktg. Serv., Inc.*, 283 F. Supp. 2d at 1163. In making this decision the court also took issue with the fact that the national registry was purportedly designed to “effectuate consumer choice,” but instead operated to “influence[] consumer choice” in that it ensured that nonprofit callers would be able to call individuals but commercial callers would not. *Id.*

¹³⁸ *Mainstream Mktg. Serv., Inc.*, 283 F. Supp. 2d at 1164; see *supra* Parts II.A–F.

¹³⁹ *Compare Mainstream Mktg. Serv., Inc.*, 283 F. Supp. 2d at 1164 with *Mainstream Mktg. Serv., Inc.*, 345 F.3d at 855. Preventing abusive and coercive sales practices as a substantial government interest has been consistently recognized by the Supreme Court. See, e.g., *Edenfield v. Fane*, 507 U.S. 761, 769 (1993) (“[T]here is no question that [the state’s] interest in ensuring the accuracy of commercial information in the marketplace is substantial.”); *Friedman v. Rogers*, 440 U.S. 1, 15 (1979) (“It is clear that the State’s interest in protecting the public from the deceptive and misleading use of [advertising] is substantial and well demonstrated.”). Additionally, the protection of privacy in the home has long been viewed by the Supreme Court as a consummate substantial government interest. See, e.g., *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165 (2002) (“[T]he protection of residents’ privacy . . . [is an] important interest[] that the Village may seek to safeguard through some form of regulation of solicitation activity.”); *Hill v. Colorado*, 530 U.S. 703, 717 (2000) (“The right to avoid unwelcome speech has special force in the privacy of the home and its immediate surroundings”)(citation omitted); *Frisby v. Schultz*, 487 U.S. 474, 484–85 (1988) (“[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.”); *Carey v. Brown*, 447 U.S. 455, 471 (1980) (“The State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.”); *Rowan*, 397 U.S. at 737 (“The ancient concept that ‘a man’s home is his castle’ into which ‘not even the king may enter’ has lost none of its vitality”); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (“[T]he right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men.”).

speech did not.¹⁴⁰ Because this distinction was unrelated to the FTC's interests in privacy and curbing deceptive telemarketing, the court held that the registry failed to materially advance its asserted substantial interests.¹⁴¹ The FTC argued that the distinction was justified by more than just a perceived "low value" of commercial speech, but to no avail.¹⁴²

Specifically, the FTC claimed that the distinction is reasonable because commercial telemarketing is responsible for a larger invasion of consumer privacy than nonprofit telemarketing and is more abusive and coercive.¹⁴³ As evidence, the FTC explained that when authorizing the national registry, Congress found that unwanted commercial telephone calls occur more often than noncommercial calls and are less expected.¹⁴⁴ In response the district court focused not on the number of commercial calls relative to noncommercial calls that a telephone subscriber might receive, but instead on the lack of differences between any given commercial call and its noncommercial counterpart.¹⁴⁵ The

¹⁴⁰ *Mainstream Mktg. Serv., Inc.*, 283 F. Supp. 2d at 1168. The Supreme Court has found that the First Amendment does not proscribe "underinclusive" limits on speech, but rather "content discrimination" limits. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) (explaining that "[t]here is no problem whatever . . . with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be 'underinclusive,' it would not discriminate on the basis of content").

¹⁴¹ *Mainstream Mktg. Serv., Inc.*, 283 F. Supp. 2d at 1166.

¹⁴² The differing positions on this issue originate from conflicting interpretations of the Supreme Court's decision in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). In *Discovery Network*, a group of commercial publishers successfully challenged a city ordinance that prohibited the distribution of commercial publications from newsracks around the city. *Id.* at 412. The Court held that the First Amendment was violated where there was no "reasonable fit" between the city's interest in improving esthetics and safety, and its content-based regulation for advancing those interests. In short, the law failed because the noncommercial publications that escaped regulation produced the exact same harms to safety and esthetics that the ordinance sought to avoid. *Id.* at 417-18. The district court in *Mainstream Marketing Services Inc.* reasoned that the FTC's regulations were similarly flawed in that they failed to account for the invasion of privacy and abuse that noncommercial calls cause. 283 F. Supp. 2d at 1167. The FTC, however, read *Discovery Network* to mean that the city ordinance was unconstitutional simply because the city failed to show why the differential treatment was justified, a showing that the FTC believed it could make. See *Mainstream Mktg. Serv., Inc.*, 345 F.3d at 855; *Discovery Network*, 507 U.S. at 428.

¹⁴³ *Mainstream Mktg. Serv., Inc.*, 345 F.3d at 856.

¹⁴⁴ *Id.* at 857. Of course, the Federal Register also reveals that when promulgating its rules, the FTC realized that commercial calls are just as invasive as charitable calls. 68 Fed. Reg. 4637. Additionally, it seems intrinsically odd that commercial calls can occur *more* often than charitable calls and yet be *less* expected. See *Mainstream Mktg. Serv., Inc.*, 345 F.3d at 857.

¹⁴⁵ See *Mainstream Mktg. Serv., Inc.*, 283 F. Supp. 2d at 1166-67. Whether numbers make a difference is discussed in *Discovery Network*, 507 U.S. at 417-18. The ordinance at issue affected commercial newsracks, which numbered 62 out of 2,000 or three percent of

court reasoned that both types of calls are equally invasive “to the privacy of someone sitting down to dinner at home,” and both callers bear an equal potential to defraud.¹⁴⁶

After finding that the FTC regulations failed to materially advance the government’s substantial interests, the district court saw no need to discuss the fourth element of the *Central Hudson* test—that the regulations must be narrowly tailored.¹⁴⁷ The conclusion of the court was therefore that the FTC’s rules creating a national registry were unconstitutional, and that the agency was enjoined from enforcing the list.¹⁴⁸ The telemarketing plaintiffs were able to sway the judicial opinion of at least one court in their favor, but the injunction was lifted by the Tenth Circuit less than two weeks later, and the FTC won on appeal.¹⁴⁹

IV. PERSONAL EXCEPTIONS

An alteration to the national do-not-call list should be implemented that would allow individuals, as opposed to the government, to choose which telemarketers—including commercial, charitable, and political—may call registered telephone numbers. Instead of the current system, whereby the government provides telephone subscribers with a mechanism to restrict commercial calls only, this proposed system would supply individuals with a registry that allows the restriction of all unwanted calls regardless of the content of the telemarketer’s message, or alternatively allows the designation of which types of calls are prohibited. It is a solution that provides complete autonomy for individuals to choose how to best protect the privacy of their homes, and it would operate as neither a government restriction on speech nor a distinction based on the content of the message of the caller.

Few changes would need to be made to the current FTC and FCC regulations to effectuate this do-not-call alteration. The current practice of registering by

newsracks in the city. *Id.* The Supreme Court agreed with the city that even the smallest decrease in newsracks would increase esthetics and safety, but further held that this did not resolve the unconstitutionally low value given to commercial speech when a distinction is made based on content. *Id.* at 418–19. In *Mainstream Marketing Services, Inc.*, the national registry was predicted by the FTC to cause a forty to sixty percent reduction in unwanted calls, but the district court nonetheless found that despite not being underinclusive, the list still discriminated based on content. *Id.* at 1165–66.

¹⁴⁶ *Mainstream Mktg. Serv., Inc.*, 283 F. Supp. 2d at 1166–67.

¹⁴⁷ *Id.* at 1168. A discussion of this element is likewise unwarranted here because the proposal set forth in Part IV is neither a “government restriction” on speech nor a distinction based on the content of the telemarketing call. *See infra* Part IV.

¹⁴⁸ *Mainstream Mktg. Serv., Inc.*, 283 F. Supp. 2d at 1171.

¹⁴⁹ *Mainstream Mktg. Serv., Inc.*, 345 F.3d at 861; *Mainstream Mktg. Serv., Inc.*, 358 F.3d 1228, 1250 (10th Cir. 2004).

telephone or online could continue, but instead of having the prohibitions of the list apply only to commercial callers, this proposal would require that the restrictions apply to all telemarketers regardless of what type of solicitation is being made. Additionally, in order to ensure that it is truly the individual choosing who may call and not the government, the final step of registering would be for each participant to indicate which types of telemarketers, if any, are still permitted to call despite the restrictions. This could easily be determined with either an online form or automated telephone operator and a series of questions such as, "Do you wish to continue to receive telephone calls from charities? From religious organizations? From pollsters? From political parties? From travel companies?" The list of these "personal exceptions" is not endless but should be as segmented as necessary to give participants discernable control over who is calling.¹⁵⁰

This "personal exceptions" proposal can be seen as a "no solicitation" sign that is displayed on the telephone instead of the front door. The government would be charged with enforcement, but only so far as directed by individuals exercising discretion to determine which types of callers the sign restricts. Telephone subscribers could choose the maximum prohibition of all unwanted calls or select as many or as few "personal exceptions" to the no-solicitation request as desired.¹⁵¹ Individual control would be central to this improved national registry.

The "personal exceptions" proposal is more loyal to the protection of privacy than the current system because it allows the individual to control which types of speech may enter the home. The Supreme Court has routinely extolled the importance of privacy in the home and has even stated that privacy concerns

¹⁵⁰ Additionally, the current practice of allowing exceptions for callers who have an "established business relationship" should continue. The recipient, of course, could still request to be placed on the caller's company-specific do-not-call list.

¹⁵¹ This proposed system for telephone users is one that is already in place for door-to-door solicitors of some property owners. For example, the Supreme Court in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, mentioned in dicta an ordinance in Stratton, Ohio that allows property owners to prohibit door-to-door solicitors by posting a "no solicitation" sign, but also allows some solicitors to continue visiting if the homeowner registers personal exceptions to the "no solicitation" request with the village. 536 U.S. 150, 156–57 nn.5 & 6 (2002). The ordinance suggests nineteen possible exceptions: (1) scouting organizations, (2) Camp Fire Girls, (3) children's sports organizations, (4) children's solicitation for supporting school activities, (5) volunteer fire department, (6) Jehovah's Witnesses, (7) political candidates, (8) beauty products sales people, (9) Watkins sales, (10) Christmas carolers, (11) parcel delivery, (12) little league, (13) trick-or-treaters during Halloween season, (14) police, (15) campaigners, (16) newspaper carriers, (17) persons affiliated with Stratton Church, (18) food salesmen, and (19) salespersons. *Id.* The validity of this ordinance was not questioned in *Watchtower*, but a different ordinance that required solicitors to obtain and carry a permit at all times during door-to-door visits was found to be an unconstitutional violation of the First Amendment. *Id.* at 160, 168–69.

outweigh the First Amendment rights of the intruder to engage in free speech.¹⁵² If the proposal at hand were to be adopted, it would demonstrate that the right of householders to protect their privacy by barring all types of telephone solicitors is no different than the same right that already exists regarding the prohibition of door-to-door solicitors.¹⁵³

In addition to satisfying privacy concerns neglected by the current regulations, a do-not-call registry that allows for “personal exceptions” does not raise the First Amendment concerns that initially delayed the current list.¹⁵⁴ This is because the proposed system and all its room for the individual to choose “personal exceptions” is potentially not a government restriction that implicates the First Amendment.¹⁵⁵ Where the individual has complete discretion to

¹⁵² See *FCC v. Pacifica Found*, 438 U.S. 726, 748 (1978) (“[I]n the privacy of the home . . . the individual’s right to be left alone plainly outweighs the First Amendment rights of the intruder.”).

¹⁵³ See *Martin v. City of Struthers*, 319 U.S. 141, 148–49 (1943) (explaining that a homeowner has the right to refuse visitors by appropriately indicating an unwillingness to be disturbed). The FCC and FTC telemarketing rules make clear that privacy is not the only justification for the national list, but it is clearly an important one. See *supra* Parts II.A–F. The telemarketing industry has argued that a national list is less responsive to consumer needs than certain state lists because states can tailor their registries to their citizens as opposed to forcing individuals into a “one size fits all” system. Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4631 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310). The proposed alteration discussed here can hardly be seen as a “one size fits all” system, however, because it continues the national list but permits each participant to tailor the list to their needs. Additionally, it is not nearly as restrictive as the “opt-in” approach promoted by some consumer groups whereby telemarketers could only contact individuals who have agreed to receive calls. See *id.*

¹⁵⁴ As discussed in Part III, the constitutional objections sustained by the district court in *Mainstream Marketing Services, Inc.* have not been influential in the Tenth Circuit. See 345 F.3d at 860. The Court of Appeal found the *Central Hudson* test satisfied for the same reasons that the Eighth Circuit saw no problem with the Telephone Consumer Protection Act applying only to commercial faxes in *Missouri ex rel Nixon v. American Blast Fax, Inc.* See 323 F.3d 649, 655–56 (holding that the substantial government interest of reducing the costs and intrusions of unsolicited faxes was advanced by restrictions that apply only to commercial faxes because commercial faxes are more intrusive than noncommercial faxes), *cited with approval in Mainstream Mktg. Serv., Inc.*, 345 F.3d at 855. Even though the current do-not-call system has been held constitutional at the appellate level, the proposed “personal exceptions” system is more responsive to the privacy values that Congress espoused as justification for the registry.

¹⁵⁵ A situation where an individual chooses to restrict speech is different than if the government restricts speech. Compare *Watchtower Bible*, 536 U.S. at 165 (holding unconstitutional a permit required to solicit) and *Martin*, 319 U.S. at 149 (holding unconstitutional a permit required to solicit) with *Rowan*, 397 U.S. at 740 (holding constitutional a statute that provided individuals with the means to restrict speech). Exactly how much government involvement is needed to implicate the First Amendment is a question that has not been answered with regard to the do-not-call list. Despite the Court’s decision in *Rowan*, government enforcement of private activity can bring the private activity within the scope of the Constitution. See *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 620

determine the types of calls that will be received, and the government makes no determination of which calls will be censored and for what reason, it cannot be said that the government is restricting speech by enforcing the decisions made by the individual.¹⁵⁶

Finally, because this proposed alteration to the do-not-call list abandons the current distinction between commercial and nonprofit tax-exempt calls, there can be no allegation of discrimination based on the content of the telemarketing message. The proposed alteration to the registry seeks to advance the substantial government interests of protecting privacy and curbing telemarketing abuse without any reference to the content of the telemarketing message, and therefore satisfies the third element of the *Central Hudson* test.¹⁵⁷

V. CONCLUSION

It continues to be easy and effective to add a telephone number to the national do-not-call list, and anyone interested in significantly reducing the amount of commercial calls received should register.¹⁵⁸ A popular registry that is successfully implemented could create the momentum needed to convince Congress that individuals should decide who is prohibited from calling, not the government. But before registering with the list and basking in the glow of a warm dinner impervious to cooling interruptions, all should remember that the current restrictions do not hold true to the proffered justification of privacy rights, nor do they adequately satisfy the constitutional prohibition against content

(1991) (holding that the use of peremptory challenges in a private civil suit was state action that was subject to constitutional constraints).

¹⁵⁶ See *Rowan*, 397 U.S. at 735. In *Rowan* a statute permitted individuals the ability to stop receiving unwanted mail. The statute was upheld in part because the government played no role in determining which mail would be restricted; the individual had unlimited power to censor. *Id.* at 733, 738. It can be argued that unlike the statute in *Rowan*, the proposed alteration to the do-not-call list is an example of the government restricting speech in that Congress will have to determine the specific categories of “personal exceptions” from which participants will choose. However, while this is slightly more government involvement than that which occurred in *Rowan*, it still allows tremendous power for the individual and it is significantly removed from the system that exists today.

¹⁵⁷ Although this proposed solution ostensibly answers the concerns of both the industry and Congress, it is somewhat naïve to suggest that the telemarketing industry would support any kind of do-not-call list, or that Congress would support a list that would effectively allow individuals to choose not to receive calls from political fundraising groups. See Liptak, *supra* note 7. However, these obstacles should not prevent the discussion of a viable solution. The proposal at hand would not limit the ability of all entities to continue contacting previous givers, and individuals inclined to donate are likely to continue to allow noncommercial entities to call.

¹⁵⁸ Links to the registry can be found at the FTC’s and FCC’s websites, www.FTC.gov and www.FCC.gov, respectively. The direct site for registration is www.donotcall.gov, or individuals may call 1-888-382-1222 from the number desired to be registered.

discrimination. If Congress wants to ensure that individuals are free to be "let alone" in the sanctity of their homes, then it must provide those individuals with the full opportunity to choose exactly who may call, and it must do so in a way that does not discriminately value the content of one message over another.